No. 12,288

IN THE

United States Court of Appeals

For the Ninth Circuit

KAJ THEILL and RAYMONDE M. THEILL,
Appellants,

vs.

CHARLES W. WHITLOCK,
Appellee.

APPELLANTS' OPENING BRIEF.

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This is an appeal from an order denying a dismissal of the proceedings and from the judgment.

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS. (TRANSCRIPT p. 14.)

The complaint in Paragraphs I and II of the First Count alleges that the jurisdiction of the United States District Court is conferred by Section 205(a) and 205(c) of the Emergency Price Control Act of 1942, as amended, and that the cause of action is predicated on a violation of Section 4(a) of said Act.

Were it not for the Rent Control Act of 1942 as amended, the United States District Court would not have jurisdiction in an action involving an amount less than $3,000.00. The District Court does not have jurisdiction for actions predicated on a breach of a lease contract where compensatory damages in an amount less than $3,000 are sought.

Pursuant to Section 205(e) of the 1942 Act, the tenant who has been overcharged may sue the landlord for treble the amount of the overcharge predicated on a violation of the provisions of the Rent Control Act.

A rent overcharge has been defined to be the difference between the rent fixed by the Housing Expediter in the area, and the amount which the landlord has taken in excess of the amount fixed in the registration.

A reading of the complaint shows that the relief sought by the plaintiff is not predicated on a violation of the Act, to-wit, the difference between the registered rent and the amount actually collected by the defendants but the cause of action is predicated on damages for an alleged breach of contract, in that it is alleged that the plaintiff did not receive the services which the landlord had agreed to supply.

Paragraph VII of the complaint (Transcript, p. 4) alleges that the defendants have failed, neglected and refused to furnish the plaintiff with (a) electricity; (b) towels and linen and (c) daily maid service during the entire period of the tenancy by the plaintiff.

The alleged damages are set forth in Paragraph VIII (Transcript, p. 4). The damages are specifically alleged as being the difference between the total rent actually paid—$1705.00; and electricity paid by the plaintiff—$83.14; the reasonable value of towels and linens, and daily maid service not supplied by the defendants—$494.00 making a total of $2282.14.

It is then alleged that the maximum rent was $1520.00 and that the difference between the total rent paid and the alleged damages for breach of contract is a balance of $762.14.

By some inexplicable reasoning the Court granted damages in the sum of $304.50 and attorneys fees in the sum of $125.00. In the findings (Transcript, p. 17), the Court granted damages as follows: wear and tear of linens—$9.00; laundry of linens—$60.00; electricity—$42.00; maid service—$96.00 or a total of $207.00.

It is clear that the damages allowed were for an alleged breach of the lease and are not predicated on the statutory remedies as set forth in the Act, to-wit, the difference between the rent charged and the ceiling rent.

A motion to dismiss was interposed by defendants, and denied.

It is the contention of the defendants that the United States District Court had no jurisdiction in an action for damages when an amount less than $3,000.00 is sought and, secondarily, there is no diversity of citizenship.

II.

THIS APPEAL IS ALSO TAKEN FROM THE JUDGMENT (TRANSCRIPT p. 7) ON THE GROUND THAT THE COURT ERRED IN ENTERING JUDGMENT PREMATURELY.

It is conceded that the maximum rent for the premises was $2.50 per day if occupied by two persons and $2.00 per day if occupied by one person. These rentals include all of the services which the complaint alleges were not furnished by the defendants during the period covered in the complaint.

It is appellants' contention that until an order had been made by the Office of the Housing Expediter reducing the rental with the eliminated services that the Court could not render judgment until the amount so fixed with the reduced services had been established, in order to determine the difference between the ceiling rental as adjusted without the eliminated services and the rent actually collected by the appellants.

In support of this contention we cite *Bowles v. Nasif,* 58 Fed. Supp. 644, at page 645:

> "There is nothing of a positive nature in the record to show that the local Board has finally decided the question of what is the proper rent to be charged for this apartment, except that the local head of that body testified from certain entries on the application or registration sheet that it was his opinion that the demand for increase above $25 a month had been denied. It seems clear that $55 per month is excessive, but I think it was the duty of the Board to consider all the evidence and elements entering into a fair rental value of this apartment at the basic period, and that until this

is done neither the landlord nor the tenant can tell what amount should apply. Each apparently was laboring under the belief that the matter was still being considered by the Board, and for which reason the tenant was paying only what he claimed he was advised to pay by that authority, to-wit, $33 per month.

This statute, 50 U.S.C.A. Appendix, Section 901 et seq., is highly penal in its nature, and before either the tenant or the Government is permitted to recover the treble damages, which it allows, I think it should be established beyond question and the Board should fix a fair rental for the property. I do not believe this has been done and until it is the suit is premature."

In *Schindler v. Zuberbuehler,* 76 Fed. Supp. 85, at page 86, the Court said:

"Without going into the question of whether the one year statute of limitations bars most of the relief sought, which defendants urge, I feel that plaintiff's action must be dismissed for two reasons. First, the payment of $55.00 per month from March 1945, to December, 1946, was not in excess of the maximum legal rent, because the OPA order did not reduce the rent below that amount retroactively; i.e., only after August 20, 1947, was the maximum legal rent for the premises $47.50. Second, the fact that plaintiff was not actually receiving the services to which he was entitled was a ground for reduction of rent, upon application to the OPA, but not for an independent suit for overpayment. Therefore, the motion to dismiss the complaint will be granted."

It is apparent that the judgment in this action was rendered prematurely in that the Court could not enter any judgment until the basis for the determination of damages had been established, to-wit, the rental for the premises which eliminated services as compared with the rent actually charged.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco, California,
May 15, 1950.

Respectfully submitted,
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Attorneys for Appellants.